(3)

(1)

0.5.1002

IN THE HIGH COURT OF JUDICATURE CHHATTISGARH AT BILASPUR

W. P. NO.253/ 2004

PETITIONER : Gopal Agarwal S/o Late Tuhi Ram Agarwal, Aged about 48 years, Occupation Transporter, R/o Dhabra Road Kharsia, Dist : Raigarh-(C.G.)

Versus

Respondents :

1. State of Chhattisgarh, Through The Secretary Food & Civil Supplies Department, DKS Bhawan, Raipur-(C.G.)

2. The Managing Director, Civil Supplies Corporation Ltd., Bal Ashram Parisar, Kacheri Chowk, Raipur, Dist : Raipur-(C.G.)

3. The District Manager Civil Supplies Corporation Ltd., Ambikapur, Dist : Surguja-(C.G.)

4. The Collector Surguja, Dist : Surguja-(C.G.)

P. R. No. 25/04
Presented by Shri Sharma
Dated 2-3-04

RECEIVED-COPY
11/8/04
Clerk to A. G. Bilaspur

WRIT U/A 226 / 27 OF THE CONSTITUTION OF INDIA FOR ISSUANCE OF A WRIT IN THE NATURE OF MANDAMUS, PROHIBITION, CERTERIORAI ETC OR ANY OTHER DIRECTIONS OR ORDER

1. Particulars of t

(78)

HIGH COURT OF JUDICATURE AT BILASPUR (CHHATTISGARH)

Writ Petition No.2503 of 2004

Gopal Agarwal

- Versus -

State of Chhattisgarh and others

AND

Writ Petition No.2504 of 2004

Mohammed Rafi & another

- Versus -

State of Chhattisgarh and others

POST FOR ORDER ON 9th FEBRUARY, 2005

Sd/-
L.C. Bhadoo
Judge
9th.2.2005

seen
upthis
10.2.05

(79)

HIGH COURT OF JUDICATURE AT BILASPUR (CHHATTISGARH)

Writ Petition No.2503 of 2004

Gopal Agarwal

- Versus -

State of Chhattisgarh and others

AND

Writ Petition No.2504 of 2004

Mohammed Rafi & another

- Versus -

State of Chhattisgarh and others

Present: -

Shri Manindra Shrivastava, Sr. Advocate with Smt. Smita Ghai, Advocate:	For the petitioners in W.P. No.2504/2004.
Shri Amit Sharma, Advocate:	For the petitioner in W.P. No.2503/2004.
Shri N. K. Agrawal, Dy. Advocate General:	For the State/respondents No.1 and 3.
Shri Kanak Tiwari, Sr. Advocate with Shri Prateek Sharma, Advocate:	For respondents No.2 & 4.
Shri Rajeev Bharat, Advocate:	For respondent No.5.

ORDER

(Passed on 18th February, 2005)

L.C. BHADOO, J.

Writ Petition No.2504/2004 filed by Mohammed Rafi & Lalan Singh and Writ Petition No.2503/2004 filed by Gopal Agarwal are being disposed of by this common order, as both these petitions relate to the same N.I.T. (Notice Inviting Tenders) dated 26-7-2004.

(2) By these writ petitions the petitioners who are engaged in the business of transportation have challenged and questioned the propriety of

the clause 4.5 of the N.I.T. dated 26th/27th-7-2004 issued by respondent No.3. The said clause relates to the eligibility criteria whereby the intending tenderers were required to possess the experience of transportation of food items of the Government Department, Government Undertaking or Semi Government Department to the tune of Rs.75 lakhs in one financial year during the last three preceding years i.e. 2001-02, 2002-03 and 2003-04.

(3) Brief facts leading to filing of these writ petitions are that the petitioner No.1 in W.P.No.2504/2004, as per averment made in the petition, is engaged in the business of transportation and has earned goodwill by his successful completion of work. The petitioner No.1 has been undertaking the transportation work of food grains from respondent No.2 since last 10 years. In addition to that the petitioner No.1 has also been undertaking the work of transportation of food grains through Food Corporation of India since last 4 years and also transportation of Tendu leaves since last 20 years. The petitioner No.2 is also a transporter and he owns 3 trucks. He has been engaged in the business of transportation for last 7 years. In the year 2002-03, he has successfully completed the work of transportation of food grains awarded by respondent No.2. The petitioner in the Writ Petition No.2503/2004 is also engaged in the business of transportation and he submitted his tenders, but he was not found eligible as per the clause 4.5, therefore, he has filed this writ petition. Respondent No.2 is the Government Supply Department and in order to fulfill the welfare measure and to implement various Government schemes of distribution and supply of food grains i.e. wheat, rice, sugar, salt, etc. in all corners of the State through various Public Distribution System, by engaging transporters district-wise. This system is in vogue since last more than 15-20 years. The intending tenderers are required to quote rates of transportation differently for supply to different centers which are 0 to 25 kms, 0 to 50 km or so on. For the financial year 2004-05, respondent No.2 issued a tender notice (Annexure-P/2) on 3-2-2004 inviting tenders from the eligible transporters for transportation of food grains in the District of Surguja in which 20

transporters including the petitioners submitted their tenders. Copy of chart showing kilometer wise lowest tender is Annexure-P/3. However, as per the petitioners' case, the said tender was dropped because respondent No.5 could not compete and emerge as L-1. Then respondent No.2 again issued notice inviting tender on 27-4-2004 (Anenxure-P/5) in which also round about 20 transporters purchased the tender documents and submitted their tenders and competitive rates were achieved, but respondent No.2 again did not award the contract of transportation to the lowest bidder and in that tender also respondent No.5 could not compete and emerge as L-1. Again, the said tender was dropped and third time vide Annexure-P/8 dated 26-7-2004 again tenders in question were invited by the Collector, Surguja and not by respondent No.2.

(4) Further case of the petitioners is that altogether a new eligibility criterion to the effect that tenderers must possess of transportation experience worth Rs.75 lakhs in respect of transportation of food items of Government, Semi Government or Government undertaking in any of the previous 3 years namely, 2001-02, 2002-03 and 2003-04. The petitioners have challenged this criteria by these writ petitions alleging that this eligibility criteria has been fixed with oblique purpose, by imposing such an arbitrary, discriminatory and unwarranted eligibility criterion and the same would expose that in order to eliminate the element of competition and to facilitate the award of contract to respondent No.5 this new eligibility criterion was created so that other otherwise eligible contractors including the petitioners may be completely eliminated and excluded at the threshold from the entire proceeding. Such a criterion is not insisted upon in any of the District in the State of Chhattisgarh in the matter of award of transportation work for the year 2004-05 that is in other 15 districts this eligibility criterion has not been fixed, therefore, the petitioners have challenged this eligibility criterion on the following grounds: (i) that the said criterion is absolutely arbitrary, unreasonable and having no nexus with the object sought to be achieved. (ii) the said criterion has been included on

extraneous considerations and colourable exercise of power only with a view to ensure elimination of element of competition which is against the public interest, (iii) the said criterion will create monopoly and has, in fact, resulted in a monopoly in favour of respondent No.5 due to the absence of there being competition by otherwise eligible tenderers; and (iv) this eligibility criterion is discriminatory on the ground that in other districts of the State of Chhattisgarh no such criterion was imposed by respondents and without such criterion having been imposed the contract was awarded pursuant to tender proceedings. The tender proceeding is vitiated by an arbitrary, discriminatory, malafides and being violative of Articles 14 and 19 (1)(g) of the Constitution of India, therefore, it has been prayed to quash the award of contract in favour of respondent No.5 and to quash whole proceeding taken up in pursuance of the tender notice dated 26-7-2004, as also to quash clause 4.5 of the said eligibility criteria.

(5) Return has been filed on behalf of respondents No.2 and 4 in which all the allegations have been denied and it has been mentioned that in the previous tenders the transporters quoted their rates even below the expenses to be incurred by the transporters in transporting the food grains. It has further been mentioned that perusal of Annexure-R/2,4/2 reveals that deliberately such lower rates were filled, which will not make the contract worth operation/execution. A cartel was formed of vested interests primarily to defeat the purpose of awarding of contract by respondent No.2 and 4 in the larger public interest, therefore, in order to check this malpractice, also in order to award the contract to the genuine transporter and looking to the situation and circumstances prevailing the said criterion has been fixed which is not in any way arbitrary, discriminatory or malafide. In the district of Surguja peculiar circumstances were prevailing as also occasioned by the tenderers like the petitioners and others. It is prime duty of the respondents to protect the public interest and systematize the transportation of essential commodities to the public at large without any hue and cry or any further difficulty to the people. The eligibility criterion is not

in any way arbitrary. As a matter of fact, to eradicate corruption and the evil of formation of a cartel by offering the lowest unworkable rates, some how, to grab the contract on the basis of lowest offer, which was not incumbent on the answering respondents to have agreed to petitioners among others have made a mockery of the said tender system. It is within the domain of the Government and authorities to fix the eligibility criterion and no judicial review is permissible in such a situation extraordinary jurisdiction of this Court cannot be invoked. The terms of the invitation to tender are not open to the judicial scrutiny the same being in the realm of contract and the Government must have a free hand in setting the terms of the tender. Therefore, the petitions be dismissed.

(6) I have heard Shri Manindra Shrivastava, Senior Advocate with Smt. Smita Ghai, Advocate for the petitioners in W.P. No.2504/2004, Shri Amit Sharma, Advocate for the petitioner in W.P. No.2503/2004, Shri N. K. Agrawal, Deputy Advocate General for respondents No.1 and 3, and Shri Kanak Tiwari, Senior Advocate with Shri Prateek Sharma, Advocate for respondents No.2 and 4.

(7) Shri Manindra Shrivastava, learned Senior Counsel for the petitioners argued that the petitioners and other transporters were successfully completing their contract regarding transportation of the food grains since last many years and in response to earlier N.I.T. dated 3-2-2004 (Annexure-P/2) and the second N.I.T. dated 27-4-2004 (Annexure-P/5) the comparative rates were quoted by the transporters. In these two N.I.T.s respondent No.5 could not compete and emerge as L-1, therefore, in order to favour him respondents No.2 to 4 devised a new criterion in which condition regarding having transported food items worth Rs.75 lakhs in a year was incorporated in order to eliminate the petitioners and other transporters and to ensure that the contract is awarded to respondent No.5. This eligibility criterion was fixed without having any nexus with the object sought to be achieved, the same being without any rationale and, therefore, it is arbitrary, unreasonable, discriminatory and that amounts to create monopoly and reduce

the element of competition. He further argued that except this district, in other 15 districts of the State of Chhattisgarh no such eligibility criterion was fixed and the tenders were accepted in the first instance itself and on this ground also it is arbitrary, irrational and unreasonable. The said criterion is fixed for extraneous considerations and colourable exercise of the power with a view to ensure elimination of the element of competition which is against the public interest and it will result in unnecessary burden on the public exchequer which is evident from the fact that contract has been awarded to respondent No.5 on much higher rates than quoted by the petitioners in previous N.I.T.s. Shri Amit Sharma, counsel for the petitioner in W.P. No.2503/2004 adopted the arguments advanced by Shri Manindra Shrivastava, learned Senior Counsel and he further submitted that he is pressing only the ground of eligibility criteria.

(8) On the other hand, Shri Kanak Tiwari, learned Senior Counsel on behalf of respondents No.2 and 4 and Shri N. K. Agrawal, learned Deputy Advocate General on behalf of respondents No.1 and 3 argued that the term of contract that is fixing of eligibility criterion is within the domain of the State Government and it cannot be a subject matter of judicial review, as respondents must have freedom to fix the eligibility criterion looking to the ground reality and situation. They are the best judges to decide the eligibility criterion and it is not for the Court or the petitioners to ask the respondents to fix a particular eligibility criterion and it is the best criterion unless the action is held to be arbitrary, unfair and actuated with bias. They further submitted that bare perusal of the previous rates regarding transportation as shown in the chart Annexure-R-2,4/4 makes it clear that after 2001-02 the rates quoted by the transporters were going down so low every year that rates quoted by them were much less than the expenses being incurred by them in running the trucks. This fact itself was disturbing, there were complaints regarding non-distribution of the food items and even malpractices were detected by the Collector, therefore, the Collector wrote a letter to respondent No.2 for fixing a particular rate and to devise some

system to have proper transportation system and in that background, looking to the lower rates cited by the tenderers, first two N.I.T.s were cancelled and the Collector, respondent No.3, who is the solitary custodian on behalf of the Government of the district to ensure proper distribution of food items and essential commodities, vide letter Annexure-R-2,4/9 suggested that in order to check the black-marketing, malpractice and to ensure proper distribution of food items, condition of having minimum experience of transportation of food items worth Rs.75 lakhs was required to be incorporated and the same was adopted. Even the district Collector convened a meeting of the transporters which was attended by the Joint Collector, Regional Transport Authority, District Manager of respondent Corporation, District Marketing Officer and the President of the Transport Association. In that meeting also apart from the other conditions, in item No.5, it was decided that in the eligibility criterion financial status and experience of 3 years should be included and a minimum rate should also be fixed. In order to have better competition and reasonable rate and to have best transporter the said condition was inserted. Therefore, the petitioners' petitions are devoid of any merit.

(9) Having heard learned counsel for the parties and having perused the record, I have considered the case law on the point. It is an admitted position that the main work of respondents No.2 to 4 is to ensure proper supply of the food items like Wheat, Sugar, Rice, Salt etc. under the Public Distribution System to whole of the district of Surguja, therefore, in the strict sense the public element is attached with the respondents and the State actions in contractual field when all actions of the State are meant for public good and expected to be fair and just. The Preamble of the Constitution of India resolves to secure to all its citizens justice, social, economic and political; and Equality of status and opportunity. Every State action must be aimed at achieving this goal. Every holder of a public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers

so vested in him are meant to be exercised for public good and promoting the public interest. This is equally true of all actions even in the fields of contract. Thus, every holder of a public office is a trustee whose highest duty is to the people of the country and therefore every act of the holder of a public office, irrespective of the label classifying that act, is in discharge of public duty meant ultimately for public good. The Hon'ble Apex Court in the case of **Shrilekha Vidyarthi Vs. State of U.P.** reported in **AIR 1991 SC 537** observed that no doubt, it is true, as indicated by us earlier, that there is a presumption of validity of the State action and the burden is on the person who alleges violation of Article 14 to prove the assertion. However, where no plausible reason or principle is indicated nor is it discernible and the impugned State action, therefore, appears to be ex facie arbitrary, the initial burden to prove the arbitrariness is discharged shifting onus on the State to justify its action as fair and reasonable. If the State is unable to produce material to justify its action as fair and reasonable, the burden on the person alleging arbitrariness must be held to be discharged. In **Dwarkadas Marfatia's** case **(AIR 1989 SC 1642)** the Court held that to oversee the State action for the purpose of satisfying that it is not vitiated by the vice of arbitrariness and no more. The wisdom of the policy or the lack of it or the desirability of a better alternative is not within the permissible scope of judicial reviews in such cases. It is not for the Courts to recast the policy or to substitute it with another which is considered to be more appropriate, once the attack on the ground of arbitrariness is successfully repelled by showing that the act which was done, was fair and reasonable in the facts and circumstances of the case.

(10) The Hon'ble Apex Court in the case of **Tata Cellular Vs. Union of India** reported in **AIR 1996 SC 11** held that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in exercise of that power of judicial review Government is the guardian of the finances of the State. It is expected to protect the

financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down. The Court further observed that the duty of the Court is to confine itself to the question of legality. Its concern should be: (1) whether a decision-making authority exceeded its powers? (2) committed an error of law; (3) committed a breach of the rules of natural justice; (4) reached a decision which no reasonable Tribunal would have reached; or (5) abused its powers. Therefore, it is not for the Court to determine whether particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time.

The principles deductible relating to scope of judicial review of administrative decisions and exercise of contractual powers by government bodies are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made.

(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative

decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to the judicial scrutiny because the invitations to tender is in the realm of contract. Normally speaking the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

Therefore, in view of the above law laid down by the Hon'ble Apex Court that all the actions of the State are to be presumed to be valid and the burden is on the person who alleges violation of Article 14 to prove the assertion that the act of the State or public authority suffers from the vice of arbitrariness.

(11) The Apex Court has held that while dealing with the case of arbitrariness, unreasonableness in the matter of contracts which are being entered by the Government, that the same is illegal, irrational and there is procedural impropriety, while looking into these aspects certain limitation has been laid down for judicial review of the decision as mentioned in the earlier part of this judgment while referring the cases decided by the Hon'ble Apex Court.

(12) Again in the matter of **Air India Limited v. Cochin International Airport Limited** reported in **2000 (2) SCC 617** the Hon'ble Apex Court held that:

> "The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are

> paramount, are commercial considerations. *The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny.* It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for *bona fide* reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision-making process and interfere if it is bound vitiated by *mala fides*, unreasonableness and arbitrariness."

Also in the matter of **Monarch Infrastructure (P) Ltd. V. Commissioner, Ulhasnagar Municipal Corporation and others** reported in **2000 (5) SCC 287** the Hon'ble Apex Court held that:

> "The terms and conditions in the tender are prescribed by the Government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. It is not for the Courts to say whether the conditions prescribed in the tender under considerations were better than the one prescribed in the earlier tender invitations."

(13) After considering all the judgments, again in the matter of **Directorate of Education and others V. Educomp Datamatics Ltd. and others** reported in **2004 AIR SCW 1505** the Hon'ble Apex Court held that:

> "The terms of the invitation to tender are not open to judicial scrutiny the same being in the realm of contract. The Govt. must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The Courts would interfere with the administrative policy decision only if it is

> arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The Courts cannot strike down the terms of the tender prescribed by the Govt. because it feels that some other terms in the tender would have been fair, wiser or logical. The Courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide."

(14) In the light of above principles laid down by the Hon'ble Apex Court, if we look into the facts of the present case and if we see as to whether action of respondents No.2, 3, and 4 by fixing the impugned eligibility criterion that the transporters must have 3 years experience in transportation of food items for a long distance and must have transported the food items to the extent of Rs.75 lakhs in one year out of the last preceding 3 years, perusal of the record, particularly, the statement Annexure-R-2,4/4 reveals that up to the year 2001-02 the rates quoted by the transporters were quite competitive, but in the last two years i.e. 2002-03 and 2003-04 the rates quoted by the transporters were shockingly so low that even the transporters quoted the rates below the expenses they were incurring in running the trucks and that made the Collector and the authorities suspicious as to how the transporters are quoting the rates so low and why are they ready to transport the goods even on the rates which are lower than the actual expenses being incurred by them in running the trucks. It is also evident from the record that the Collector received certain complaints and he even conducted raid at some place and found malpractices in distribution of the food items.

(15) On this count, learned Senior Counsel for the petitioners argued that, that could not have been made a ground for fixing the eligibility criterion, as far as transporters were concerned, none of the transporters and particularly, the petitioners were ever detected or found playing malpractice in transportation of the food grains. It is true that there is nothing on record which shows that the petitioners were ever detected to involve in malpractice in transporting the food grains. But, it is also an

admitted fact that as per the Collector's report who himself checked the Distribution System and certain malpractices were noticed, looking to those malpractices in Distribution System coupled with the shocking low rates quoted by the petitioners even at the cost of bearing loss in transportation made the authorities suspicious and in order to check the malpractices one of the methods which was thought proper in the circumstances was to introduce the eligibility criterion in order to ensure that only the transporters having good sound financial status and good reputation and capable to execute the order singly this condition was fixed. If the transporters are given reasonable competitive rates, then there will be no possibility of indulging in malpractice and that can be one of the methods to check the malpractices. It is evident from the Annexure-R-2,4/8 that even the Collector convened a meeting of all concerned i.e. Joint Collector, Regional Transport Authority, District Manager of respondent Corporation, District Marketing Officer and the President of the Transport Association to devise some good policy to ensure safe transportation of food grains and in which certain decisions were taken and in the item No.5 it was decided that eligibility criterion regarding minimum 3 years transportation experience and the financial status of the transporters must be incorporated. Thereafter, vide letter dated 19-7-2004 (Annexure-R-2,4/9), the Collector wrote a letter to the Managing Director of respondent No.2 for incorporating the eligibility criterion in question for transporters to become eligible to participate in the tender process.

(16) As far as the argument of Shri Manindra Shrivastava, learned Senior Counsel for the petitioners that the eligibility criterion of having transported the goods worth Rs.75 lakhs in one financial year was so high that in this area nobody could have been able to achieve this target and so far the petitioners along with other transporters were transporting the food grains on different routes, therefore, this eligibility criterion was deliberately fixed in order to exclude the genuine and bonafide transporters from the competition. But, I do not find any substance in this argument for the reason that 4 transporters were found eligible under the fixed eligibility criterion

and who put their tenders and out of them rates of respondent No.5 were found lowest, competitive and fair, therefore, 4 transporters were eligible and they submitted their tenders. In the circumstances, it cannot be held that eligibility criterion was so stringent that persons having that experience were not available and the same was introduced in order to ensure that the contract is awarded to respondent No.5, as mentioned above, 3 other persons were also found eligible and 4 tenders were there, so it cannot be said that there was no healthy competition and there were no eligible persons to submit their tenders and this criterion was simply fixed only to eliminate the petitioners and element of competition.

(17) During the course of arguments, it was specifically enquired from learned Senior Counsel for the petitioners that as to why the petitioners were quoting so low rates for transporting food grains which was even lower than the actual expenses being incurred by the transporters in running their trucks. Learned Senior Counsel replied that these transporters after the delivery of the food items at the respective places, used to get the goods from those places for transportation to Surguja and in that they were getting good rates that is why loss incurred by the petitioners in transporting the food grains was being compensated in the return trip while transporting the goods of the private persons to Surguja otherwise the petitioners are required to send their trucks empty to collect items from private persons. But, I am afraid to accept this statement because it is not based on any record. When respondents have specifically raised the point in their reply that on account of malpractice and looking to the shocking low rates they became suspicious about the bonafide of the petitioners that is why in order to have competitive rates and better transporters, they introduced this eligibility criterion. But to refute these allegations no rejoinder has been filed by the petitioners indicating the reasons for quoting lower rates than the actual expenses incurred by them. Therefore, at this stage, without any material on record, statement of learned Senior Counsel for the petitioners cannot be believed.

(18) In view of what has been mentioned above, it cannot be said that the eligibility criterion inserted by the respondents have no reasonable nexus with the object sought to be achieved, in fact, reasons mentioned above compelled the respondents to devise some system to check unhealthy competition of the transporters who are ready to transport the food grains at the lower rates than the actual expenses incurred by them in running their trucks.

(19) Now, coming to the point raised by learned Senior Counsel for the petitioners that in the third tender rates quoted by respondent No.5 has been accepted by the respondents are higher than the rates quoted in earlier two tenders, therefore, it will be a loss to the public exchequer. As argued by learned Senior Counsel for respondents that rates are quite reasonable and there is nothing on record which goes to show that the rates quoted by respondent No.5 and accepted by the other respondents No.2, 3 and 4 are exorbitant or unreasonable and as has been mentioned in the earlier part of this order that earlier rates quoted by the petitioners in first and second N.I.T. were shockingly so low and which was nothing but unhealthy competition and the petitioners quoted rates even at the cost of loss to them. Being a welfare State and for the reasons mentioned in the earlier part of this order it was the duty of the respondents that they should try to ensure that the rates are competitive and reasonable. For example, for ensuring the rates even below the actual expenses incurred by the transporters is in no way going to serve the public interest. That is not the duty of respondents to ensure that the rates are even lower than the actual expenses incurred by the transporters. An inference can be drawn from that fact that if such lower rates are accepted, then there is every chance of committing malpractice.

(20) Now, coming to the question about monopolizing in favour of respondent No.5 and to ensure that respondent No.5 should get the contract, it is an admitted position that in the third N.I.T. after inserting the new eligibility criterion, in all 11 persons participated in the tender process and out of 11 persons, 7 persons were found ineligible including the petitioners herein

and 4 persons were found eligible and the contract was awarded to respondent No.5 looking to the competitive rates among 4 tenderers. Therefore, in the facts and circumstances of the case, it cannot be said that there was no competition. 4 persons quoted their rates and out of 4 persons, respondent No.5 was the lowest. The petitioners have not alleged in the petitions or by way of rejoinder that what should be the actual and reasonable rate of transportation looking to the expenses to be incurred by the transporters. In the circumstances, it cannot be said that the rates are on higher side and action of respondents amounts to creation of monopoly in favour of respondent No.5, as the monopoly means creating a right in favour of one person exclusion of the others, whereas, in the present case, apart from respondent No.5, 3 other transporters participated and out of 4, respondent No.5's rates were found competitive and lowest.

(21) Now, coming to the question that in none of other districts such a criterion was fixed, therefore, it is discriminatory. But I do not find any merit in this argument also. It is an admitted position that since beginning respondents No.2 was inviting the tenders for transportation of food grains district wise and that must have been done looking to the ground situation in each district. As far as fixing the criterion with particular district Surguja is concerned, as has been mentioned in earlier part of this order that earlier also there was no such eligibility criteria, but since last two years, since the transporters started quoting the rates which were lower than the actual expenses being incurred by the transporters, that made the respondents to devise some system to stop this unhealthy practice and to overcome that difficulty this eligibility criterion in this district was inserted and that too after guidelines prepared in the meeting of all concerned. In other districts such things must not be prevailing that is why such a criterion was not introduced. The petitioners have not been able to bring on record anything which goes to show that in other districts also similar rates were quoted by the transporters which were quoted by the petitioners in the first and second N.I.T.. Therefore, no legitimate ground of discrimination can be raised in

respect of the petitioners that this eligibility criterion was fixed for the district of Surguja is discriminatory.

(22) Therefore, in view of the above facts, I am of the opinion that the petitioners have not been able to establish that the eligibility criterion inserted by respondents is in any way arbitrary, irrational or actuated with malafide or to eliminate the element of competition. As has been mentioned above that the term of the tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract and the Court cannot sit as a Court of appeal but merely reviews the manner in which the decision was made. The petitioners have not been able to bring on record any irregularity or irrationality or illegality in the manner in which eligibility criterion has been fixed, as the Government has taken a conscious decision to deal with the Distribution System in the district of Surguja, as such there is no violation of Article 19 (1)(g) of the Constitution of India.

(23) Now, coming to the question raised by learned Senior Counsel for respondents in view of the arbitration condition No.14 of the terms and conditions that the dispute was to be referred to the Arbitration Tribunal, therefore, these writ petitions are not maintainable, but I do not find any substance in the argument of learned Senior Counsel for respondents No.2 and 4 for the reason that this condition was incorporated in the terms and conditions of N.I.T. and so far the petitioner were not awarded any contract and they have not entered any agreement with respondents No.2 and 4, therefore, without any agreement the matter cannot be taken up by the Arbitration Tribunal. N.I.T. is a notice inviting applications and it was not an offer, offers were made by the petitioners and the same were not accepted by respondents. Therefore, the contract was not complete and even as per Sections 7 and 8 of the Arbitration and Conciliation Act, 1996, in order to refer the matter to the Arbitration Tribunal there must be an arbitration agreement which is not in this case and for this view I am supported by the judgment of the Hon'ble Apex Court reported in **2000 (4) SCC 539** in the

matter of **P. Anand Gajapathi Raju and others V. P.V.G. Raju (Dead) and others.**

(24) Now, coming to the question raised by learned Senior Counsel for respondents that other 3 eligible tenderers and 5 ineligible tenderers are not made party in these cases, therefore, these petitions suffer from non-joinder of party. In this argument also I do not find any substance for the reason that contract has been awarded to respondent No.5 and he has been arrayed as respondent No.5 and the petitioners have challenged the eligibility criterion. If the petitions are allowed, then fresh N.I.T. is bound to be called and it is not a case where if the petitions are allowed, then other tenderers will entitle for the contract, therefore, there is no defect of non-joinder of party.

(25) In the result, these petitions are liable to be dismissed and the same are dismissed. No costs.

Sd/-
L.C. Bhadoo
Judge
10th-2-2005

Barve